

Proposed Legislation Solves for 'Black Hole' Litigation Spawned When a Divorce Litigant Dies

By Tracy Julian and Katherine Beilin

What Is a 'Black Hole' Case?

New Jersey statute (N.J.S.A. 3B:8-1) guarantees a married individual a share of their spouse's assets upon that spouse's death (elective share). Separately, N.J.S.A. 2A:34-23 also guarantees divorcing spouses the right to fair distribution of marital assets upon divorce (equitable distribution). Once a married person commences divorce litigation, however, the right of both spouses to an "elective share" of a decedent spouse's assets is terminated by law; yet, if a spouse passes away while divorce litigation is pending, current law also deprives the surviving spouse the right to equitable distribution of marital assets. Thus, a spouse's death during divorce litigation precludes the surviving spouse the benefit of both the "elective share" and "equitable distribution" of marital assets, leaving the surviving spouse in a legal "black hole" as to the decedent spouse's assets.

In response to several decades



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of litigation in "black hole" cases, the New Jersey Assembly recently passed Assembly Bill A2351 on Oct. 27, 2022. The bill intends to solve the legal conundrum by permitting courts to effectuate equitable distribution of assets in pending divorce matters despite the death of a divorce litigant. The bill also reaffirms that a divorcing surviving spouse is not entitled to an elective share of a decedent spouse's estate. Bill A2351 moved to the Senate as Senate Bill S2991 on Nov. 3, 2022, where it is presently pending in the Senate Judiciary Committee.

Early 'Black Hole' Litigation

In one of the earlier, more notorious "black hole" cases, *Jacobson v. Jacobson*, 146 N.J. Super. 491

(1976), a husband allegedly killed his wife while their divorce was pending. The husband moved to abate the divorce in its entirety, including the wife's claims for equitable distribution and alimony. While the court granted abatement for the divorce cause of action and alimony claim, it added the wife's estate to the divorce litigation and declined to dismiss her claim for equitable distribution. In so doing, the court invoked the equitable maxim that a "wrongdoer should not profit by his own wrong." While *Jacobson* is the most infamous case on this particular topic given the murder, it is important to highlight the court's emphasis on the extraordinary circumstances in applying the equity maxim to permit the

divorce matter to continue for purposes of litigating the equitable distribution claim after the death of a divorce litigant.

A second set of companion cases in the same proximate time frame as *Jacobson* further explored when equity may dictate a divorce matter to continue after a litigant's passing. In *Olen v. Olen*, 124 N.J. Super. 373, 374 (App. Div. 1973) (*Olen I*), the trial court granted a judgment of divorce on Sept. 14, 1972. The defendant wife passed away shortly thereafter on Dec. 22, 1972, before the court formally entered the judgment. The surviving husband sought to be the sole owner of the marital property the parties previously held as tenants by the entirety. The Appellate Division held that the husband did not have a survivorship right in the real estate the parties owned while they were married, but rather he had a right as tenant in common, as divorce converts an estate by the entirety to a tenancy in common. In *Olen v. Melia*, 141 N.J. Super. 111, 113 (1976) (*Olen II*), a property distribution dispute that followed *Olen I*, the Appellate Division confirmed that, while an action for divorce subsides with death, "the disposition of marital property would not and should not abate." *Olen I* and *II* collectively held that the wife's death after the judgment of divorce, but before formal entry of divorce, did not prevent "nunc pro tunc" equitable distribution of marital property or award of counsel fees.

Later, in *Castonguay v. Castonguay*, 166 N.J. Super. 546, 549 (1979), the court stressed that *Jacobson*, *Olen I*, and *Olen*

II were exceptions rather than the rule due to extraordinary circumstances. The *Castonguay* court noted that the holding in *Jacobson* was premised on equity; it would be unfair for a party to profit where he killed his wife. The *Olen* cases involved a divorce judgment that was signed before the wife's death and ruled on distribution of property following the entry of divorce judgment. *Castonguay*, essentially, clarified that the *Olen* cases were probative only where a party dies post-judgment. In *Castonguay*, the trial court entered an order granting a second wife's motion to dismiss her divorce action after the husband died while the divorce was pending. The husband's first wife and other creditors appealed, claiming rights to the husband's estate upon his death by virtue of a previous separation agreement. The *Castonguay* court held that, because the husband's death occurred prior to the start of trial, both the divorce action and all claims for equitable distribution were abated. Thus, *Castonguay* reiterated that an action for divorce ends at death absent extraordinary circumstances, such as those set forth in *Jacobson* and the *Olen* matters.

Evolution of the 'Black Hole' Issue

Though previous cases had addressed fact patterns where a divorce litigant died pending divorce litigation, *Carr v. Carr*, 120 N.J. 336, 340 (1990), was the first landmark decision to formally identify the issue and coin the "black hole" phrase. In that matter, a second wife initiated divorce



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proceedings against her husband. He died during the divorce litigation and left the entirety of his estate to his children of a previous marriage. The Supreme Court held that the wife was not entitled to equitable distribution under the divorce statute because the husband's death terminated the proceedings. Further, the wife was not entitled to an elected share through probate due to her separation from her husband and pending divorce proceedings at the time of his death. Nonetheless, the court opined that "if warranted by the evidence, the equitable remedy of constructive trust should be invoked and imposed on the marital property" to provide equitable distribution for the wife and to prevent unjust enrichment. *Carr* clarified that equity will permit a surviving spouse to continue divorce litigation for the limited purpose of equitable distribution in appropriate circumstances.

The Supreme Court addressed "black hole" litigation again in *Kay v. Kay*, 200 N.J. 551, 552 (2010). While previous cases assessed a surviving spouse's interest in assets of a deceased spouse, *Kay* concerned the interests of the deceased spouse's estate in the marital assets. Specifically, the *Kay* court analyzed whether the equitable principles set forth

in *Carr* also support scenarios where the decedent spouse's estate alleges a similar claim for equitable distribution. In that matter, the wife filed for divorce in July 2006. The husband identified assets held both in his name and jointly between the parties on Aug. 30, 2007, before his death and during the divorce litigation. See *Kay v. Kay*, 405 N.J. Super. 278, 282 (App. Div. 2009). Notably, the divorce litigation included the husband's claim that the wife diverted marital assets during the marriage. Later, the deceased husband's estate sought the right to "intervene and continue the divorce action to recover diverted assets for equitable distribution from the surviving spouse." The estate claimed that the wife wrongfully diverted assets to the detriment of the estate, specifically alleging that the wife purportedly titled all assets held jointly with the decedent in her own and her daughter's name.

The Supreme Court held consistently with *Carr*, echoing the Appellate Division's reasoning to "promote fair dealing between spouses by ensuring that marital property justly belonging to the decedent will be retained by the estate for the benefit of the deceased spouse's rightful heirs and by preventing unjust enrichment of the surviving spouse." The *Kay* court essentially used the framework set forth in *Carr* to allow the estate to continue divorce litigation to seek equitable distribution of marital assets, reasoning that depriving the estate of such an opportunity

would not serve policies of equity and fair dealing. *Kay* recognized an estate's right to present a claim for equitable relief relating to marital property, even though statutory equitable distribution is unavailable upon the death of a party during divorce.

Pending Legislation

As noted above, Assembly Bill A235 and Senate Bill S2991, seek to cure the complex "black hole" issue. The proposed bills amend N.J.S. 3B:5-3, N.J.S. 3B:5-4, Section 58 of P.L.2004, c.132 (C.3B:7-1.1), N.J.S. 3B:8-1, N.J.S. 3B:8-2, and N.J.S. 2A:34-23. The language that most prominently addresses "black hole" cases reads as follows:

If a complaint not dismissed pursuant to R. 4:6-2 of the Rules of Court has been filed for an action under paragraph (1) of this section, and either party to the litigation dies prior to the entry of the final judgment, the court's authority to effectuate an equitable distribution of the property shall not abate.

Harkening back to the spirit of *Jacobson*, the bills also read:

The court may not make an award concerning the equitable distribution of property on behalf of a barred from inheriting under subsection a. of Section 58 of P.L.2004, c.132 (C.3B:7-1.1), a party responsible for an attempt or conspiracy to murder the other party.

First and foremost, the bills provides that if a complaint has been filed for divorce or dissolution, and either party in the

litigation dies prior to final judgment, the court will be vested with the authority to follow through with equitable distribution of marital property.

Furthermore, the bills expand intestate succession and elective share to include civil unions, and provide that a surviving spouse or partner may not receive an intestate share of the decedent's estate and will have no right of election to take a share of the decedent's estate.

Thus, the bills amend current law to provide that if a partner in a civil union, married person, or person in a domestic partnership dies, the surviving spouse has a right of election to take one-third of the estate unless either the decedent or surviving spouse has filed a complaint for divorce, dissolution, or termination of the domestic partnership. As also noted above, while the Assembly passed Bill A2351 in October 2022, we await the vote on Senate Bill S2991, which is presently in the Senate Judiciary Committee. If the Senate ultimately passes the bill, decades of "black hole" litigation will come to a close and the issue will no longer plague divorce litigants and estates of divorce litigants in the event a divorcing party dies.

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